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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 330.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - Plaintiff in Error,

versus

NATHAN PARKER, AS ADMINISTRATOR OF THE ESTATE OF EDWARD PARKER, DECEASED, - - - Defendant in Error.

Reply Brief for Plaintiff in Error.

In Error to the Court of Appeals of the State of Kentucky.

BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

October 25, 1916.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

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LOUISVILLE & NASHVILLE RAILROAD COMPANY,
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NATHAN PARKER, AS ADMINISTRATOR OF THE ESTATE OF EDWARD PARKER, DECEASED, - *Defendant in Error.*

REPLY BRIEF FOR PLAINTIFF IN ERROR.

In Error to the Court of Appeals of the State of Kentucky.

A substantial difference between our original brief for defendant (plaintiff in error) and the brief for plaintiff (defendant in error) is that in our brief all of the evidence shedding any light on the question whether the engine movement which was being made at the time decedent was hurt was in furtherance of interstate commerce or intrastate commerce, was quoted; whereas, plaintiff's brief makes only fragmentary quotations from the evidence, and omits material portions thereof. As one illustration of what we mean, see page 17 of our original brief (printed Record, pp. 128, 129), where conductor

Town testified that the only reason the engine had hold of the empty box car at the time of the accident, was because that car, as well as other empty cars, stood on the track between the engine and M. C. car 13908, which the engine was then on its way to couple to and attach to the interstate train; and that the only purpose of the movement of the empty car at that time was to get it out of the way of switching the interstate car. And there is no evidence to the contrary. In other words, there is no evidence which proves or from which it can reasonably be inferred, that the engine had hold of the empty car at the time of the accident for the purpose of switching it to Hoe's plant, or to any other destination, or elsewhere or otherwise than as we have just stated. There is nothing in the other testimony given by conductor Town, nor in that given by brakeman Tobias, which raises an issue of fact on this proposition. The testimony of the latter does not cover this point at all, and, therefore, is not, in any sense, contradictory of Town's testimony.

We submit that counsel for plaintiff is in error in arguing that the question whether the engine movement, when decedent was hurt, was in furtherance of interstate commerce or intrastate commerce, is a question of State law, as to which the finding of the State courts is conclusive upon this court. The exact question we have here was decided by this court, adversely to plaintiff's contention, in St. L., S. F. & Texas R'y Co. v. Seale, 229 U. S. 156, on authority of which defendant practiced the case at bar in the trial court. In the Seale case, as in this one, the action was brought in the State Court, not under

the Federal Act, but under State law. The railroad company contended there, as here, that decedent was injured while employed in interstate commerce, and that the carrier's liability for the death was exclusively regulated and controlled by the Federal Employers' Liability Act. The Texas courts denied this contention. On writ of error this court upheld the contention and reversed the Texas courts upon the ground that the evidence did not admit of any other view than that the case made was within the Federal statute. The court said:

"It comes then to this: The plaintiffs' petition, as ruled by the State Court, stated a case under the State statute. The defendant by its special exceptions called attention to the Federal statute and suggested that the State statute might not be the applicable one. But the plaintiffs, with the sanction of the court, stood by their petition. It was to the case therein stated that the defendant was called upon to make defense. A plea in abatement would have been unavailing, because the plaintiffs were the proper parties to prosecute that case. When the evidence was adduced it developed that the real case was not controlled by the State statute but by the Federal statute. In short, the case pleaded was not proved and the case proved was not pleaded. In that situation the defendant interposed the objection, grounded on the Federal statute, that the plaintiffs were not entitled to recover on the case proved. We think the objection was interposed in due time and that the State courts erred in overruling it."

See, also, N. C. R. Co. v. Zachary, Admr. of Burgess, 232 U. S. 248, discussed on page 30 of our original brief.

As this court said in St. Louis & Iron Mountain R'y Co. v. McWhirter, 229 U. S. 265, on pp. 276, 277—an

action under the Federal Hours of Service Act—where the State Court held that the violation by the carrier of the statute was the proximate cause of McWhirter's injury, but this court held otherwise, and reversed the judgment for that reason:

"• • • But it was long since pointed out in *Neilson* v. *Lagow*, 12 How. 98, the court speaking through Mr. Justice Curtis, that to admit that the authority to review the action of a State Court where it has decided a Federal question can be rendered unavailing by a suggestion 'that the court below may have rested its judgment' on a non-Federal ground, would simply amount to depriving this court of all power to review Federal questions if only a party chose to make such a suggestion. But, aside from this, the argument, when rightly considered, reduces itself to this, that the power to review a Federal question which has been expressly decided by a State Court does not obtain where such court has also decided another Federal question. This is true since the finding that there was some evidence to go to the jury on the subject of negligence independently considered was necessarily a ruling against the binding instruction asked at the close of the testimony upon the assumption that there was nothing adequate to go to the jury to show liability under the Federal law. While it is true, as we have said, that coming from a State Court the power to review is controlled by Rev. Stat., Section 709, yet where in a controversy of a purely Federal character the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law. *Kansas City So. R'y* v. *Albers Commission Co.*, 223 U. S. 573, 591; *Creswill* v. *Knights of Pythias*, 225 U. S. 246."

The Court of Appeals of Kentucky recognized that if the testimony in the case at bar showed that decedent was engaged in interstate commerce at the time he was hurt, defendant so practiced the case in the lower court as to have entitled it to a peremptory instruction to the jury to find in its favor, in accordance with defendant's motion in that behalf (printed Record, p. 149; our original brief pp. 3 and 35).

Therefore, the contentions made in plaintiff's brief, that (1) the finding by the Kentucky courts that decedent was engaged in intrastate commerce at the time he was hurt is binding upon this court; and (2) that, in addition to raising the Federal question by the motion for a peremptory instruction, defendant should also have raised the question by offering instructions which would have been applicable if the case had been tried under the Federal law, notwithstanding the insistence of plaintiff and the trial court that the case was governed by State law and that such law alone was applicable, are unsound. If the case is governed by the Federal law, we submit, under the Seale case, *supra*, there can be no question that defendant sufficiently raised and saved this question. The Court of Appeals of Kentucky so held.

The only question, therefore, for this court to decide, is whether or not, under the evidence (regardless of how the Kentucky courts viewed it), decedent was engaged in interstate commerce at the time he was hurt. If he was, there can be no recovery, as the Kentucky Court of Appeals held, and the judgment should be reversed.

If, on the other hand, decedent was then engaged in intrastate commerce, the judgment should be affirmed.

We ask, as in our original brief, that the judgment be reversed.

Respectfully submitted,

BENJAMIN D. WARFIELD,
Counsel for Plaintiff in Error.

October 25, 1916.

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Supreme Court of the United States

OCTOBER TERM, 1916, NO. 330.

Louisville & Nashville Railroad Company, - - - - - - - - Plaintiff in Error,

versus

Nathan Parker, as Administrator of the Estate of Edward Parker, Deceased, - - - Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

In Error to The Court of Appeals of The State of Kentucky.

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B. G. WILLIAMS,
Of Counsel.

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OCTOBER TERM, 1916, NO. 330.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - *Plaintiff in Error,*

versus

NATHAN PARKER, AS ADMINISTRATOR OF THE ESTATE OF EDWARD PARKER, DECEASED, - - - - - - *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

STATEMENT.

This is an appeal from a judgment of the circuit court of Knox county, Kentucky, awarding defendant in error $7,000.00 in damages for the death of his intestate, which was affirmed by the Kentucky Court of Appeals. (165 Ky. 658.)

Decedent was employed by the plaintiff in error as fireman on its switch engine operating in its railroad

yards at Middlesboro, Kentucky. He was fatally injured while in the cab of his moving engine by coming in contact with a freight caboose standing on another track. This caboose had been negligently left by the railroad company in such position that it did not clear or leave unobstructed the entrance to the track into which the engine was moving at the time of decedent's injury.

At the time of the accident, the engine had hold of an empty box car, destined to be loaded in Middlesboro, Kentucky, and which had been picked up in another part of the yard. This empty box car was then being placed by the engine on track No. 10 and was the only car attached to the engine at the time of the accident. There is an issue in the evidence that, after so placing this empty car, the engine was, in the same movement, going to remove from said track No. 10 a loaded interstate car, to be placed in an outgoing interstate train. The operation of placing this empty intrastate box car in track No. 10 had not been completed when the accident occurred.

ARGUMENT.

The theory of the plaintiff in error is that the evidence shows that at the time of the injury sued for, the immediate objective of the operation in which the switching crew was then engaged was the removal of the loaded interstate car referred to.

The theory of the defendant in error is that the evidence shows that at the time of the injury sued for the immediate objective of the operation in which the switching crew was then engaged was the removal and

placing of this empty intrastate car on track No. 10, or, in connection with another empty car on track No. 10, to be moved and placed on the furnace siding.

We concede, if the uncontradicted evidence shows that at the time of the injury to decedent, the object of that particular switching movement the yard crew were then making, was the transfer of this interstate car, decedent was then engaged in interstate commerce.

However, we contend this is not shown. The only conflict in the evidence on this point is, whether, after so placing this empty intrastate car, the yard crew then, in the same movement, intended to move from the same track the loaded interstate car. It is our contention that this latter intention or objective is immaterial.

The only witnesses who testified on this subject are George Tobias, a brakeman in the yard crew, and W. R. Town, the conductor or foreman of the yard crew. Tobias testified as follows:

(R., 56.)

"Q. What was your crew doing at the time Parker was killed? A. They had hold of two cars—one was going in 9 and going in with number 10 near the heading.

Q. You say you were going—you had a car up in 9 and one to go in 10? A. Going in 10 the car I had hold of."

What the witness was here testifying to (as explained by his subsequent testimony and that of the yard foreman) was that a car had been placed on track No. 9 immediately before the movement in question, and that the engine was at that time going in track No. 10 with another car. He further testified:

(R., 57.)

"Q. That night when you put the car in No. 9, as you say, and was going into track No. 10, when Parker was killed, was anything on No. 11 track? A. Yes, sir."

(R., 66.)

"Q. What were you going to do with the car you were putting in No. 10? A. I think it was going to Mr. Hoe.

Q. Who is Mr. Hoe? A. He runs a business.

Q. It was being put there in Middlesboro? A. Yes, sir."

(R., 68.)

"Q. That night didn't he (the foreman) line it (track No. 10) up *and direct you to have the engineer to move this car in No. 10* that night before Parker was killed? A. He told me to enter 9 and go in 10.

Q. Didn't Mr. Town, in charge of the work there, direct you and Smith to signal the engineer *and for him to put that car in No. 10 there?* Didn't Mr. Town direct you to do that? A. Yes, sir.

Q. Tell the jury whether or not you would have signalled the engineer there, *or made any effort to put that car in No. 10* before Mr. Parker was killed if Town had not directed you to do it? A. No, sir." (Italics mine.)

(R., 74.)

"Q. I believe Mr. Robsion asked you in detail about placing cars on track No. 9. Tell the jury what you had done after the engine had gone out of track No. 9. A. We backed in No. 10 with the head car. That one car."

(R., 78.)

"Q. Where did you get instructions from Mr. Town to put that car in 10? A. Taken from the conductor.

Q. How long were you putting it in there? A. Before putting it in 10?

Q. Yes? A. We was backing in there with it.

Q. *How long before you backed in there with it had you got instructions from Mr. Town to put it in there?* A. Seven or eight minutes, I suppose." (Italics mine.)

This is all of this witness' testimony on this point. He was introduced by the plaintiff. We submit its effect, in substance, is that at the time of the injury to decedent, the immediate operation in which this switch crew was engaged was the placing of this empty car (which was to be loaded out of that yard) on track No. 10. The witness testifies unequivocally that what *he* was then doing (he being the one who was directing the movements of the switch engine) was obeying the instructions of the foreman, Town, to put this empty car in No. 10. No other construction can be placed on his evidence.

The railroad company relies upon the testimony of Town, the yard foreman, to support its theory that the immediate movement in which the switch engine was engaged at the time of the injury to decedent was the transfer of the loaded interstate car on track No. 10 to an outgoing train which was being made up on another track. However, we call the attention of the court to the fact that Town does not pretend to deny that they were then placing this empty intrastate car on track No. 10.

As corroborative of the testimony of brakeman Tobias heretofore alluded to, that Town had directed him to place this empty car on track No. 10, and that was what the crew were then doing. Town testified:

(R., 113.)

"Q. What did your brakeman do with reference to the moving of the cars you directed them to move? A. Go ahead and move them as I told them.

Q. How would they be moved? A. If I wanted a car put in No. 5 or 10, or put on a train to go out of there, I would tell them to throw that car on track so and so."

A significant feature of the evidence on this question—significant because of its meagerness—is, *why was this empty intrastate car attached to the engine at this time at all?* What was that switch crew doing hauling it around over the yard? Town testified in regard to this as follows, which is the only testimony in the record on the subject:

(R., 129.)

"Q. This car that you had put in 9 and when that was attached to the engine and just before you went into 10, and also the one you had attached to your engine when you went into 10, where did you get them? A. I expect these were (No.) 87 cars *I was putting in the proper place with them,* possibly this car come out of 87 train, or this car was going in 9 to be switched or weighed." (Italics mine.)

And he further testified as to this switching movement:

(R., 117.)

"Q. How were you to go about getting that (interstate) freight car? A. I was to couple to them (the intervening cars, one of them being then attached to his engine) *and they went back in No. 10 and stayed."* (Italics mine.)

We submit to the court that even if, as the foreman says, it was one of the purposes of this movement of the engine to bring this interstate car out from track No. 10, it was the primary purpose, in going into track No. 10, to place there "in the proper place" this empty intrastate car then attached to the engine. Town testified that this empty was a car "I was putting in the proper place." He had not yet put it "in the proper place" when the accident happened. The engine and car were then just entering track No. 10. The brakeman, Tobias, testifies unequivocally that the object was to put this car on that track, No. 10—that he had been instructed by the foreman to so place it—and does not qualify his testimony, as does Town, by saying they were then going to bring out an interstate car, between which and the car they were putting in there intervened some twelve or fifteen other cars.

We submit that both the putting in of this empty intrastate car and the removal of the loaded interstate car may be considered to have been within the contemplation of the yard crew in going into this track No. 10. But the first thing they were going to do, as shown by the uncontradicted evidence, *was to put this empty car in that track;* and this had not been completed when the accident occurred. This brings the case in hand, as well said by the Kentucky Court of Appeals, within the rule announced by your Honors in *Illinois Central Railroad Co. v. Behrens,* 233 U. S. 473, a case involving an injury to a switchman who was at the time immediately engaged in switching intrastate cars:

"That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

There is conflict in the evidence whether the movement in question had any connection with the transfer of this interstate car.

The evidence is that the primary purpose of the switching movement in question was to place this empty intrastate car, then attached to the engine, in track No. 10. This being true, it is immaterial in what movement the crew was next going to engage.

It is not by any means certain whether the engine on which Parker was killed was, at the time, on its way to then get car M. C. 13908. An inference to that effect is allowable upon the testimony of witness Town alone. But, as has been shown, the contrary may be gathered from the testimony of the witness Tobias. Another significant feature of the evidence is, the card by which the crew was working directed the "giving" of two empty box cars ("EBX Cars") to the furnace, and one empty box car to the tannery (R., 128). The car attached to the engine at the time of the accident was evidently one of the two cars destined for the furnace. In fact, it was delivered to the furnace later on during that night ("in the morning after some time between that time and time I was quitting next morning." R., 117). Tobias understood at the time it was so destined (R., 66). Town says (R., 117) there were twelve or fifteen cars standing on track 10 before M. C. car 13908 was reached, and some of them, at least, were empties. Whether the

card was executed consecutively—from top to bottom—or according to convenience, it would therefore appear that the delivery of this box car then attached to the engine would precede the putting of M. C. 13908 into train 89. Nor does Town testify when he put car 13908 into train No. 89. The "Conductor's Freight Check" (Exhibit "H. E. H. No. 1") (R., 138), shows the conductor of train 89 received the car on July 1, 1913; hour not stated.

The primary question of fact for decision, therefore, was: Was the movement of the empty car attached to the engine at the time of the accident an act isolated from the movement of car M. C. 13908? Or, was the engine at that time moving to then get car M. C. 13908 to transfer it to train No. 89?

The trial court might have submitted the question to the jury. But, instead of submitting it, the court decided it outright, holding it was an isolated act, therefore, an intrastate transaction. Whether some other tribunal might decide the same question otherwise, giving more credit to Town and less to Tobias and the working card, is beside the question. That finding of fact was affirmed by the Kentucky Court of Appeals.

Whatever might be the rule of law to be applied if the fact was, the injured employe was taking his engine into a sidetrack to get out an interstate car, and was injured on the way by a projecting car, it is not here for decision. The fact which controls this case, in its Federal aspect, is as found by the State court.

In *Dower v. Richards*, 151 U. S. 658, the question was whether a plot of land underlaid by a ledge of gold-

bearing rock, was excepted from the United States statutes excepting such property from town-site patent where the gold-bearing stratum was not of practical value. The State court in which the suit originated found the fact to be that the ledge had previously been worked out and abandoned as no longer containing gold-bearing rock in quantities sufficiently valuable to be worked. The Supreme Court of the State affirmed the judgment of the trial court on that finding of fact. Said this court:

"The principal ground on which the plaintiffs in error seek to reverse the judgment of the Supreme Court of California is that its decision in matter of fact was erroneous, and contrary to the weight of evidence in the case. But to review the decision of the State court upon the question of fact is not within the jurisdiction of this court."

In the instant case it must have appeared affirmatively that the movement of the car in which Parker was killed was an interstate transaction, before the Federal question could be presented. If the evidence be such as that the controlling fact might in truth be one way or the other—according to the weight accorded the evidence, upon the credibility of the witnesses, or other controlling factor—the decision of that question of fact one way by the State court eliminates the other hypothesis of fact. As, therefore, it does not appear conclusively that the movement of the engine was in interstate traffic, but on the contrary the trial court found the fact to be it was not so moving, I submit there is no Federal question here for decision.

The opinion of the Kentucky Court of Appeals is found at page 148 of the record. A careful reading of that opinion discloses that it is based upon the finding of fact by the trial court that the immediate operation in which decedent was engaged at the time of his injury was (R., 152) "switching this intrastate car from one part of the yard to another, and expected shortly thereafter to remove from track No. 10 some twelve or fifteen cars so that it might switch the interstate car to another track."

This statement found in the opinion of the Kentucky court (R., 152): "That it (the engine) was engaged at the time in switching intrastate cars so that it might ultimately get at and switch to another track the interstate car," does not mean that the particular movement was to clear the way so as to get at the interstate car, but that in the course of the execution of a number of movements, each having its own definite objective, it would result ultimately that the interstate car would be reached and also handled. There is no evidence that the switching of this empty intrastate car to track No. 10 was for the ultimate purpose of getting at and switching to another track the interstate car. It was being put in there—in its proper place, for the present—and went back in there and stayed, until in the course of the night's work it was to be removed to its destination, the furnace track. The putting of this empty car in track No. 10 had no connection with the subsequent removal of the interstate car from that track, except that, inasmuch as the engine was then working on that track, and its next work might include, or might not, the handling

of the interstate car, it was as practical railroading under existing conditions (not clearly shown in the record) might suggest to the workmen in charge.

What if it was the ultimate intention of the crew in going in track No. 10 to transfer this loaded interstate car after they had put in its proper place on that track the empty intrastate car they then had? They did not commence the second operation until they had completed the first, nor was the second operation their primary objective. It was doubtless their ultimate intention to remove this empty intrastate car to Hoe's siding some time during the night (and they did do so), but it was not their present intention to do so. Their present intention was to put it in its proper place on track No. 10. Why this was the present proper place for it was doubtless well known to the yard crew—perhaps it was a matter of convenience in the completion of the final operation of switching the car to Hoe's siding. It was doubtless their intention, after they placed this car, then attached to their engine, on track No. 10, to switch that night a great many other cars containing interstate freight besides the car M. C. 13908 that happened to be also on track No. 10.

So, the question for decision, we take it, is, whether a yard switching crew, then engaged in switching an intrastate car from one track in the yard to another, which operation had not been completed, and expecting shortly thereafter to remove from the track upon which it was then placing the empty intrastate car, a loaded interstate car, is engaged in intrastate or interstate commerce.

We have already adverted in this brief to the opinion in *Illinois Central Railroad Co. v. Behrens,* 233 U. S. 473. It was the rule laid down in this opinion that the Kentucky courts applied to the proven facts in this case in their holding that decedent was engaged in intrastate commerce at the time of his injury.

The facts in the Behrens case (which with a change in the name of the city and State where the accident occurred could be said to be the facts in this case), as recited in the opinion, were as follows (p. 476):

"The intestate was in the service of the railroad company as a member of a crew attached to a switch engine operated exclusively within the city of New Orleans. He was the fireman, and came to his death, while at his post of duty, through a head-on collision. The general work of the crew consisted in moving cars from one point to another within the city over the company's tracks and other connecting tracks. Sometimes the cars were loaded, at other times empty, and at still other times some were loaded and others empty. When loaded the freight in them was at times destined from within to without the State or *vice versa,* at other times was moving only between points within the State, and at still other times was of both classes. When the cars were empty the purpose was usually to take them where they were to be loaded or away from where they had been unloaded, *and oftentimes, following the movement of cars, loaded or empty, to a given point, other cars were gathered up and taken or started elsewhere.* In short, the crew handled interstate and intrastate traffic indiscriminately, frequently moving both at once and at times turning directly from one to the other. At the time of the collision the crew was moving several cars loaded with freight which was wholly intrastate, and upon completing that movement was to have gathered up and taken to other points several other cars as a step or link in their transportation to various destinations within and without the State. The question of law upon

which the Circuit Court of Appeals desires instruction is, whether upon these facts it can be said that the intestate at the time of his fatal injury, was employed in interstate commerce within the meaning of the Employers' Liability Act." (Italics mine.)

In response to that request for instruction as to the law, this court said (p. 477):

"Passing from the question of power to that of its exercise, we find that the controlling provision in the act of April 22, 1908, reads as follows: 'Section 1. That every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.' Giving to the words 'suffering injury while he is employed by such carrier in such commerce' their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employe is engaged is a part of interstate commerce. The act was so construed in *Pedersen v. Delaware, Lackawanna & Western Railroad Co.*, 229 U. S. 146. It was there said (p. 150): 'There can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employe is engaged by the carrier in such commerce.' Again (p. 152): 'The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?' And a like view is shown in other cases. (Citing cases.)

"Here, at the time of the fatal injury the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another.

That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

The Kentucky Court of Appeals, following the *Behrens* case, applied the rule that each separate movement of a yard-engine switching crew is a complete operation within itself, and that no one of them affects the quality of the other, respecting the application of the Federal statute. As here, when it is the intention of the yard crew to subsequently and in the same operation remove a loaded interstate car from the same track upon which they are then placing an empty intrastate car, the placing of the empty intrastate car on the track is a complete operation in itself, and the crew is engaged in intrastate commerce until that operation is completed.

To adopt the reasoning of the plaintiff in error will lead to an absurdity in the construction of the Federal Employers' Liability Act; for almost every railroad operation would be held to be an act in furtherance of interstate commerce—the movement of intrastate trains, or intrastate freight, would be attributed to clearing the road, or clearing the space occupied, for the movement of interstate trains or interstate freight.

We submit it is not the ultimate purpose or object in which a switching crew is engaged that determines the character of commerce in which it is engaged, *but what they are actually doing at the time of the injury*—their immediate objective—that controls.

Plaintiff in error cites *Pennsylvania Co. v. Donat*, 239 U. S. 50. In that case the court held that, under the circumstances, *it was not error to submit to the jury* the question of whether the employe was engaged in interstate commerce at the time of his injury. This court said (p. 52):

"Two loaded coal cars coming from without the State were received in the carrier's yard at Fort Wayne, Indiana. They were destined to Olds' private switch-track connecting with the yard; and, acting under instructions, Donat commenced the switching movement requisite to place them thereon. There was evidence tending to show that in order to complete this movement it became necessary to uncouple the engine from the loaded cars and with it to remove two empty ones from the private switch. While engaged about the removal defendant in error was injured. The trial court submitted to the jury for determination whether he was engaged in interstate commerce at the time of the injury, and in approving such action the Circuit Court of Appeals was clearly right."

The court did not hold that under the evidence Donat was engaged in interstate commerce, nor did it hold that if he was injured while engaged in removing the two empty cars mentioned, he was engaged in interstate commerce. The removal of the empty intrastate cars from the switch was only an incidental act to the completion of the prime objective—the placing of the loaded interstate cars on the switch. That differs from the case in hand, for the reason that here there is evidence that the removal of this loaded interstate car from track No. 10 was not the prime objective on which the switching crew was then engaged—but that the prime objective of the movement in question was to place this

empty intrastate car on track No. 10, and *then, later,* remove therefrom the loaded interstate car.

Plaintiff in error also cites *New York Central & Hudson River Railroad Co. v. Carr,* 238 U. S. 260, to support its contention that plaintiff in error was engaged in interstate commerce at the time of his injury. There, the court said:

> "The plaintiff was a brakeman on an interstate train. As such, it was a part of his duty to assist in the switching, backing and uncoupling of the two cars so that they might be left on a siding in order that the interstate train might proceed on its journey."

The object to be accomplished in the *Carr* case was the completion of the journey of the interstate train between its termini. To make that case apply to this case, it must be held that the object of this switching crew was to facilitate the passage through this yard of interstate commerce. But this cannot be held to be its ultimate object, much less its sole or controlling object. In *Illinois Central Railroad Co. v. Behrens, supra,* it was held that, where a yard switching crew "handled interstate and intrastate traffic indiscriminately, frequently moving both at once and at times turning directly from one to the other," the true test always is: Is the particular or immediate act or operation in question directed to the movement of intrastate or interstate commerce? What is the immediate thing to be accomplished?

Plaintiff in error is insisting the trial court should have directed a verdict for the defendant upon the ground that the evidence showed Parker was employed in interstate commerce at the time of his accident, and, therefore, the Kentucky statute, under which the case

was practiced, could not apply. But it is overlooked that the plaintiff tendered an amended petition, before the trial, in which it pleaded the Federal statute, and facts bringing the case within it. The trial court refused to allow it filed, to which plaintiff duly excepted (R., 18). True, the bill of exceptions states that plaintiff's counsel announced to the court that he would not be able to prove the case under the Federal statute. Still, he did not withdraw his amendment, but was insisting on its being filed, as shown by the exceptions taken. So, if the court had been of opinion, or it were true, that the evidence showed the case to be within the Federal statute exclusively, the trial court should have instructed under that statute. But plaintiff in error did not ask for such instructions. The defendant in error presented such pleadings as fully apprised plaintiff in error of the nature of the case. The parties went to trial under such proceedings as would have enabled the plaintiff in error to have had the case submitted to the jury under instructions submitting to them the measure of recovery fixed by the Federal statute, had plaintiff in error moved for such. Instead, it relied on the practice of moving a non-suit—a failure of evidence. Whichever view we take of the evidence, whether it shows the particular employment to have been interstate or intrastate commerce, there was not a failure of proof. Plaintiff in error took and had the advantage of the plea of contributory negligence, which under the State statute is a bar. We submit plaintiff in error has not suffered prejudice of its substantial rights in this case. It does not complain now that a wrong measure of dam-

ages was applied by the jury, or that the verdict was excessive; or that it was surprised by the admission of evidence of the character of the service in which Parker was killed. It says in effect the trial court erred in refusing to file the amended petition bringing the case expressly within the Federal statute, and as it failed to let the amendment be filed, the trial court then erred in not committing the further error of directing a verdict for the defendant in the face of all the testimony in the record. We submit the allegations of the petition were broad enough to have admitted the evidence showing the movement of the car when Parker was killed was an interstate movement, and in fact all the evidence tending to establish that theory was admitted. All that was needed was the giving of the law to the jury submitting the case to them under the appropriate measure of damages. Plaintiff in error failing to ask for instructions different from those given, and having failed to urge that failure to properly instruct the jury under the Federal statute to the State court for reversal, we submit it is too late to present the question for the first time in this court. *California Powder Works v. Davis,* 151 U. S. 389; *Clark v. Pennsylvania,* 128 U. S. 395; *Schuyler Bank v. Bollong,* 150 U. S. 85, 88.

An affirmance is asked.

Respectfully submitted,

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